125-345

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 1,304.

JOHN C. SPENCER, PLAINTIFF IN ERROR,

vs.

CAROLINE L. MERCHANT, EXECUTRIX OF JOHN MERCHANT, DECEASED.

BRIEF OF PLAINTIFF IN ERROR.

ALBERT DAY,
Attorney for Plaintiff in Error.

MATTHEW HALE,
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Attorney for Plaintiff in Error.

MATTHEW HALE,
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SUPREME COURT OF THE UNITED STATES.

No. 1304.

JOHN C. SPENCER,

Plaintiff in Error,

AGAINST

CAROLINE L. MERCHANT, EXECUTRIX, ETC., OF JOHN MERCHANT, DECEASED.

BRIEF OF PLAINTIFF IN ERROR.

In error to the Supreme Court of the State of New York to review a determination of the Court of Appeals of said State remitted to said Supreme Court.

STATEMENT.

This case was originally submitted under the provisions of the New York Code of Civil Procedure, upon an agreed statement of facts to the General Term of the Supreme Court of the State of New York.

The plaintiff on the 20th day of June, 1883, entered into a contract with John Merchant, the defendant's testator, whereby he agreed to sell to him a certain piece of land situate in the town of New Lots, Kings county and State of New York, the boundaries of which are stated in the record, and to execute and deliver to said John Merchant a full covenant warranty deed of said premises free and clear of incumbrances. Part of the consideration was paid, and the balance was payable on the delivery of the deed. Upon examination the said Merchant discovered that there remained unpaid on said premises an assessment amounting to $1,221.73, with interest thereon from November, 1881, which he demanded should be paid by plaintiff according to contract, in order that he might receive the premises free from incumbrance, which the plaintiff refused to do. The assessment in question was for laying

out and grading Atlantic avenue, in the town of New Lots, and was made under the provisions of an act passed by the Legislature of the State of New York, August 12, 1881 (ch. 689), more particularly referred to in the record herein. A copy of this act is contained in the appendix to this brief (*infra*, pages 22 to 24.) The said act authorized and directed the Board of Supervisors of the county of Kings to levy on the assessment-roll of the town of New Lots in and for the year 1881, on the lands against which assessments for regulating and grading Atlantic avenue in pursuance of chapter 217 of the Laws of 1869, as amended by chapter 619 of the Laws of 1870, were canceled by the Comptroller January 29, 1879, and charged to the county of Kings, a sum equitably apportioned among the several parcels comprising said lands which shall be sufficient to refund to the State of New York a sum, its due by reason of such cancellation; which sum amounting to $40,664.96, was duly credited August 28, 1876, by the Comptroller of said State to the treasurer of Kings county, and the interest charged thereon by said Comptroller as required by law to February 1, 1879, amounting to $8,293.33, together with further interest thereon at six per cent per annum from February 1, 1877 to the date of such levy. It also provided that before proceeding to levy such sums, the said board should apportion the same among the said several parcels of land thereinbefore mentioned, and should give ten days' notice of the time and place when they would meet to make such apportionment, which notice should be published daily in the newspaper published in the county of Kings, and that all persons interested in said lands should be entitled to be heard before said board *upon the question of said apportionment.* (Section 1.)

The canceled assessments referred to were originally imposed under chapter 217 of the Laws of 1869, as amended by chapter 619 of the Laws of 1870, which act, so far as it authorized the assessment in question, was held to be unconstitutional and void as depriving of the parties assessed of their property without due process of law, by the Court of Appeals of the State of New York, in the cases of

Stuart v. Palmer, 74 N. Y., 183.
Horn v. New Lots, 83 N. Y., 100.
See Record, folio 10.

The assessment so levied is that assessed by the commissioners in 1869, against the several parcels returned by the collector of the town of New Lots as unpaid, to the Kings county treasurer, and by the said Kings county treasurer returned to the Comptroller of the State of New York, together with interest and fees. It is on isolated parcels, not contiguous, and many of them not fronting on the avenue improved, and a great portion of the original, together with most of the benefited territory as fixed by the statute of 1869, are *not* included within the law of 1881, or directed to be taken into consideration in making the reassessment. The amount directed to be assessed under the law of 1881, included also a proportional part of the expenses of the void assessment of 1869, upon the parcels mentioned; which assessment was decided to be void by the Court of Appeals in Stuart v. Palmer, 74 N. Y., 183. (See Record, fol. 10.)

It was claimed by the plaintiff in error in the court below, that the statute chapter 689 of 1881 and the proceedings thereunder, were in violation of the provisions of the Constitutions both of the United States and of the State of New York, and were void, as taking the property of the persons assessed without due process of law. He invoked the former decisions of the Court of Appeals in Stuart v. Palmer, and Horn v. New Lots, 83 N. Y., 100, and claimed that the statute of 1881 was, equally with that of 1869, a violation of the constitutional provisions referred to, protecting a citizen against being deprived of his property without due process of law. The Court of Appeals, however, decided otherwise, and by its mandate, which was remitted to the State Supreme Court, directed said Supreme Court of the State to give final judgment in favor of the defendant.

See Remittitur, fols. 4 to 7.
See Final Indorsement, fol. 25.
See Opinion of Court of Appeals, fols. 27 to 34.

Since the decision of the Court of Appeals the original defendant has died, and his executrix has been substituted in his place. (Fol. 21.)

ASSIGNMENT OF ERRORS.

The plaintiff assigns for error:

First. That the Supreme Court of the State of New York under the direction of the Court of Appeals of that State, held that the statute, chapter 689 of the Laws of New York for the year 1881, and the proceedings thereunder were constitutional and valid, whereas the said court should have decided that the said statute and the proceedings thereunder were in violation of the Constitution of the United States, and were void for the reason that they deprived, or attempted to deprive, the plaintiff and the other persons assessed thereunder of their property without due process of law.

Second. That the said courts of the State of New York held and decided that the assessment mentioned in said record of $1,221.73, was a legal and valid assessment upon the lands and premises mentioned in said record, whereas the said court should have decided that the said assessment was illegal and void, because the same was imposed in pursuance of an act of the legislature of the State of New York which was unconstitutional and void.

Third. That judgment was given for the defendant against the plaintiff, whereas by the law of the land, judgment should have been given for the plaintiff against the defendant, and the plaintiff in error prays for a reversal, and that he may be restored to all things, etc.

See folio 39, 40.

ANALYSIS OF THE STATUTES AND JUDICIAL DECISIONS, RELATING TO THE QUESTIONS INVOLVED.

The statutes referred to are set forth in the appendix hereto annexed, with the stipulation that said copies may be used and referred to on the argument of this cause, and considered in evidence herein, and that either counsel may refer to any other statutes, and to any reports of judicial decisions bearing upon the questions involved herein, with the same effect as if the same had been put in evidence.

See page 27, *infra*.

The original assessment was made under chapter 217 of the laws of 1869. This statute was fully considered by Judge Earl in the

case of Stuart v. Palmer (74 N. Y., 183). The following extract from his opinion (which was concurred in by the entire court), will show the ground upon which the Court of Appeals adjudged that statute, so far as it provided for assessing the expenses of regulating, grading, etc., to be unconstitutional and void:

"It will be observed that two assessments are provided for by the acts; one for the damages awarded to the owners of the land, under section 3 of the act of 1869, as amended, and another for the expense of regulating, grading, etc., under section 4, as amended. The former assessment was to be made and confirmed after proper notice to and hearing of the persons interested. The latter assessment could be made without any notice to or hearing of any person. The law requires no notice, and a provision for a notice cannot be implied. Upon the assumption that the law was valid, there was ample authority for the commissioners to make the assessment without any notice or hearing; and the assessment, when once made in the exercise of the arbitrary discretion thus conferred, would be unassailable, and, however unjust, unfair and oppressive, would be subject to no review, unless fraud or corruption could be shown." (Page 186.)

* * * * * * *

"I am of the opinion that the Constitution sanctions no law imposing such an assessment without a notice to, and a hearing or an opportunity of a hearing by the owners of the property to be assessed. It is not enough that the owners may by chance have notice, or that they may, as a matter of favor, have a hearing. The law must require notice to them, and give them the right to a hearing and an opportunity to be heard. It matters not, upon the question of the constitutionality of such a law, that the assessment has, in fact, been fairly apportioned. The constitutional validity of law is to be tested, not by what has been done under it, but what may by its authority be done. The legislature may prescribe the kind of notice and the mode in which it shall be given, but it cannot dispense with all notice.

"It is not disputed that the legislature has unlimited power (except as restrained by the Federal Constitution) to impose taxes and assessments for public purposes. It may impose taxes upon all property within the State; and in such cases the owners are supposed to receive a compensation for the burdens thus imposed in the protection and benefits of the government under which they live. It may impose taxes upon local divisions of the State for the purposes of local government, and all the citizens residing in the locality must bear the burdens, as they all receive the benefits of the local government. It may cause or authorize local improvements to be made and authorize the expense thereof to be assessed upon the land benefited thereby. But in all cases there must be

an apportionment of the burdens, either among the property owners of the State, or of the local division of the State, or the property owners specially benefited by the improvements. In either case, if one is required to pay more than his share, he receives no corresponding benefit for the excess, and that may properly be styled extortion or confiscation. A tax or assessment upon property arbitrarily imposed, without reference to some system of just apportionment, could not be upheld." (Page 189.)

* * * * * * *

"It must be conceded that property cannot be taken by the right of eminent domain, without some notice to the owner, or some opportunity on the part of the owner, at some stage of the proceeding, to be heard, as to the compensation to be awarded him. An act of the legislature, arbitrarily taking property for the public good and fixing the compensation to be paid, could not be upheld. There would in such case be the absence of that "due process of law" which both the Federal and State Constitutions guarantee to every citizen. Can it be that when the public takes land for a public highway, the owners thereof are entitled to a hearing as to the compensation which they are to receive, and yet that the land on both sides of the highway may be assessed to pay such compensation to their entire value, without any opportunity on the part of the owners to be heard?

"The legislature can no more arbitrarily impose an assessment for which property may be taken and sold, than it can render a judgment against a person without a hearing. It is a rule, founded on the first principles of natural justice, older than written constitutions, that a citizen shall not be deprived of his life, liberty or property without an opportunity to be heard in defense of his rights, and the constitutional provision that no person shall be deprived of these "without due process of law," has its foundation in this rule. This provision is the most important guarantee of personal rights to be found in the Federal or State Constitution. It is a limitation upon arbitrary power, and is a guarantee against arbitrary legislation. No citizen shall arbitrarily be deprived of his life, liberty or property. This the legislature cannot do nor authorize to be done. "Due process of law" is not confined to judicial proceedings, but extends to every case which may deprive a citizen of life, liberty or property, whether the proceeding be judicial, administrative or executive in its nature. (Weimer v. Bruenbury, 30 Mich., 201.) This great guarantee is always and everywhere present to protect the citizen against arbitrary interference with these sacred rights." (Pages 190, 191.)

* * * * * * *

"No case, it is believed, can be found in which it was decided that this constitutional guarantee did not extend to cases of assessments, and yet we may infer from certain dicta of judges that their attention was not called to it, or that they lost sight of it in

the cases which they were considering. It has sometimes been intimated that a citizen is not deprived of his property within the meaning of this constitutional provision by the imposition of an assessment. It might as well be said that he is not deprived of his property by a judgment entered against him. A judgment does not take the property until it is enforced, and then it takes the real or personal property of the debtor. So an assessment may generally be enforced not only against the real estate upon which it is a lien; but, as in this case, against the personal property of the owner also, and by it he may just as much be deprived of his property, and in the same sense, as the judgment-debtor is deprived of his by the judgment.

We are therefore of opinion, for the reasons stated, that the acts under consideration were unconstitutional and void, and hence that no assessment laid under them could be a cloud upon title to land, and that the judgment should therefore be affirmed with costs."

The question came again before the Court of Appeals in the case of Horn v. Town of New Lots (83 N. Y., 100), in which case it was held that the Act of 1869, as amended by the Law of 1870, being unconstitutional and void, and having been so declared in Stuart v. Palmer, a person whose money had been applied in payment of the assessment, and used for the benefit of a town, could maintain an action against the town to recover it back.

These decisions of the Court of Appeals and especially the judgment of that court in the case of Stuart v. Palmer, have been frequently cited with approval in the courts of the United States, and are unquestionably sound expositions of the questions of constitutional law involved.

See remarks of Mr. Justice Field in the Railroad Tax cases, 13 *Fed. Rep.*, 753, *and of Judge Sawyer in the same case, pages* 763 *and* 764; *and of Mr. Justice Field in the case of County of Santa Clara v. Southern Pacific R. R. Co.*, 18 *Fed. Rep., at page* 410.

See also Burns v. Multnomah R. R. Co., 15 Fed. Rep., 177, 183.

It is enough answer that the law of 1869, as amended, was adjudged by the highest court of the State of New York to be a violation of the provisions both of the State and of the Federal Constitutions, and to be void, and in consequence of such decision, the assessments in question were canceled, and the statute, chapter 689 of the laws of 1881 (*infra*, page), was enacted by which the amount of the assessments thus canceled, with the interest thereon, includ-

ing a proportional part of the expenses of the void assessment of 1869 (see Record, folio 10), were directed to be levied upon the lands against which the former assessment of 1869, as amended by the law of 1870, had been canceled. The law of 1881, provided for notice and a hearing before the Board of Supervisors *upon the question of said apportionment* (see last clause of section 1 of chapter 689 of 1881, *infra*, page 23), but did not provide for any hearing as to the apportionment between the lands thus assessed and the lands the assessments against which, under the law of 1869, had not been canceled, but had been paid.

The Court of Appeals (Judge Earl, who wrote the opinion in Stuart v. Palmer, and Judge Rapallo, dissenting), sustain the proceedings under the law of 1881, holding that the same were within the power of the legislature. Judge Finch says in his opinion:

"The legislature may commit the ascertainment of the sum to be raised and of the benefited district to commissioners, but is not bound to do so, and may settle both questions for itself, and when it does so its action is necessarily conclusive and beyond review.

"Here an improvement has been ordered and made, the expense of which might justly have been imposed upon adjacent property benefited by the change. By the Act of 1881, the legislature imposes the unpaid portion of the cost and expense, with the interest thereon, upon that portion of the property benefited which has thus far borne none of the burden. In so doing it necessarily determines two things, viz., the amount to be realized and the property specially benefited by the expenditure of that amount. The lands might have been benefited by the improvement, and so the legislative determination that they were, and to what amount and proportion of the cost, even if it may have been mistakenly unjust, is not open to our review. *The question of special benefit* and the property to which it extends is of necessity a question of fact, *and when the legislature determines it* in a case within its general power its decision must of course be final.

"We can see in the determination reached possible sources of error and perhaps even of injustice, but we are not at liberty to say that the tax on the property, covered by the law of 1881, was imposed without reference to special benefits. *The legislature practically determined that the lands described in that act were peculiarly benefited by the improvement to a certain specified amount*, which constituted a just proportion of the whole cost and expense; and while it may be that the process by which the result was reached was not the best attainable, and some other might have been more accurate and just, we cannot for that reason question an enactment within the general legislative power." (Record, pp. 29, 31.)

"These views furnish also an answer to the objection that the only hearing given to the land-owners relates to the apportionment of the fixed amount among the lots assessed, and none is given as to aggregate to be collected. No hearing would open the discretion of the legislature or be of any avail to review or change it. A hearing is given by the Act as to the apportionment among the land-owners which gives them an opportunity to raise all pertinent and available questions and dispute their liability, or its amount and extent. The precise wrong of which complaint is made appears to be that the land-owners now assessed never had opportunity to be heard as to the original apportionment, and find themselves now practically bound by it as between their lots and those of the owners who paid. But that objection becomes a criticism upon the action of the legislature and the process by which *it determined the amount to be raised and the property to be assessed;* unless, by special permission, that is a hearing never granted in the process of taxation. The legislature determines expenditures and amounts to be raised for their payment, the whole discussion and all questions of prudence and propriety and justice being confined to its jurisdiction. It may err, but the courts cannot review its discretion. In this case it kept within its power when it fixed, first, the amount to be raised to discharge the improvement debt incurred by its direction; and, second, when it designated the lots and property, which, in its judgment, by reason of special benefits, should bear the burden; and having the power, we cannot criticise the reasons or manner of its action. The land-owners were given a hearing, and so there was no constitutional objection in that respect, nor was that hearing illusory. It opened to the land-owner an opportunity *to assail the constitutional validity of the act under which alone an apportionment could be made*, and that objection failing, it opened the only other possible questions of the mode and amounts of the apportionment itself. We think the act was constitutional.

"The judgment should be affirmed with cost.

"All concur except Rapallo and Earl, JJ., dissenting." (Pages 31–34.)

Briefly stated the history of the case is this: The legislature of the State of New York, by chapter 217 of the Laws of 1869, as amended in 1870, undertook to impose an assessment for the expense of grading and regulating Atlantic avenue in the county of Kings, upon certain lands situate in the town of New Lots. Some of the owners of the lands thus attempted to be assessed, paid the assessment; others resisted the same. The Court of Appeals held that the law and the proceedings thereunder were unconstitutional and void, and thereupon the assessments against the contesting parties which had under the law of the State been

returned by the county treasurer to the Comptroller of the State, were canceled. The legislature then, by chapter 689 of the Laws of 1881, authorized and directed the supervisors of Kings county to levy upon the lands which had thus been relieved from an unconstitutional and void assessment, the entire amount of the original assessment, including the proportional part of the expenses of the void assessment of 1869, and interest on the whole amount as charged by the Comptroller, and further interest up to the date of the levy to be made. No hearing was provided by the law of 1881, except upon the question of the apportionment of the amount thus levied among the owners of lands thus reassessed. This last law was pronounced by the Court of Appeals, in this case, to be constitutional and valid; Judges Earl and Rapallo dissenting.

POINTS OF PLAINTIFF IN ERROR.

FIRST. THIS COURT HAS JURISDICTION OF THE CASE.

The validity of the New York statute, chapter 689 of the laws of 1881, and of the authority exercised thereunder, was drawn in question on the ground of its being repugnant to the Constitution of the United States, and the decision of the State Court was in favor of its validity.

It was claimed by the plaintiff that the statute was unconstitutional as depriving the persons assessed of their property without "due process of law." This was claimed to be not only a violation of article I, section 6 of the Constitution of the State of New York, but also of article XIV, section 1 of the Constitution of the United States, although the constitutional provisions are not specifically referred to.

When the final judgment of a State court necessarily involves an adjudication of a claim made therein that the statute of the State is in derogation of rights secured to the party by the Constitution, this court has jurisdiction of the case in error, although the State court did not in terms pass upon the point.

Chic. Life Ins. Co. v. Needles, 113 U. S., 574.

In this case the plaintiff claimed that the enforcement of the assessment made under the statute deprived him of his property without "due process of law." This was a claim that it violated rights secured to him by the Constitution of the United States;

and the decision of the Court of Appeals was in favor of the validity of the statute and the proceedings thereunder.

SECOND. THE STATUTE IN QUESTION WAS UNCONSTITUTIONAL AND VOID.

I. *The following propositions were established by the Court of Appeals in cases arising under the original assessment of the lands in question under chapter* 217 *of the laws of* 1869, *as amended in* 1870.

1st. A law imposing an assessment, without giving to the owner notice and an opportunity to be heard, is unconstitutional and void.

Stuart v. Palmer, 74 N. Y., 183.

2d. Assessments for local improvements can only be justified with reference to special benefits to the land assessed.

Id., page 189.

3d. Taxation and assessment imply apportionment. Each person must share the burden of taxation and assessment equally with *all others in like situation.* An arbitrary imposition of a fixed sum on special property, without apportionment, would be unconstitutional and void.

Id., pages 189, 190.

The provisions of chapter 217 of 1869, as amended by chapter 619 of the laws of 1870, relating to the assessment of the expenses of regulating, grading and improving the avenue in question, were held to be unconstitutional and void, as violating the above principles, and not to be a cloud upon title.

Id.
Horn v. New Lots, 83 N. Y., 100.

II. *The Legislature cannot validate an unconstitutional act or any act which it might not have previously authorized.*

Cooley on Const. Lim., 381 (4th ed., p. 477).

In the language of Judge Wallace, in a recent case: "It will not be contended the legislature can sanction retroactively such proceedings in the assessment of a tax as it could not have sanctioned in advance. This assessment was void, because the persons

subjected to it were deprived of notice, and thereby lost the opportunity to be relieved, in whole or in part, from the payment of the tax. The curative act perpetuates the vice which was originally fatal to the assessment."

Albany City Nat. Bank v. Maher, 9 Fed. Reporter, 884, 885.

This well-settled principle disposes of any claim that the assessments in question were made valid by section 3 of chapter 339 of the Laws of 1885 (*infra*, p. 27).

III. *Chapter* 689 *of* 1881 *violates each and every of the principles stated above.*

1. *The notice or hearing for which it provides is a mockery. The amount to be assessed upon the lots in question is arbitrarily fixed by the act.*

The only proceeding of which the owners have notice, and in regard to which a right to a hearing is given them, is the meeting of the Board of Supervisors to apportion the amounts named "among the said several parcels of land hereinbefore mentioned;" that is, the lands, the assessments against which, under the unconstitutional laws of 1869 and 1870, had been canceled.

See Laws of 1881, page 925, sec. 1.

In other words, the law fixed the amount to be assessed upon these lands (which were isolated parcels, not contiguous, many of them not fronting on the avenue improved, and only a small portion of the benefited property as fixed by the statute of 1869, case, fol. 10) without reference to whether such amount was a fair proportion of the aggregate expense, and without reference to whether the aggregate amount named had been properly determined, and permitted a hearing only as to distribution of the burden among owners of the lots named. To illustrate, represent the lots originally assessed, as benefited by the expense, by the figures 1, 2, 3, 4, 5. Assume that the assessments on the portions represented by the figures 3, 4 and 5, amounting to $60,000, were paid. The assessments on 1 and 2, amounting to $40,000, were canceled. The Act of 1881 says to the owners of 1 and 2, "we fix the whole amount of the expense at $100,000. On that question you have

no right to be heard. We fix your share of the burden at $40,000. Upon that question you shall not be heard. But we will hear you as to how that $40,000 shall be divided between the lots 1 and 2." As to the important and vital questions of the amount actually and properly expended under the law of 1869, and the apportionment of that amount between lots 1 and 2, and lots 3, 4 and 5 a hearing is denied. It is granted only on the minor and comparatively unimportant question as to the apportionment of the amount thus arbitrarily fixed among the owners of the lots made the victims of the law. The Act of 1881, in effect, renders judgment for $40,664.46 principal, and $8,293.33 interest, and additional interest, against the owners of the selected lots without giving them a hearing, but graciously permits them to be heard as to the methods and proportions in which they shall contribute to make up these sums. To hold that *such* a hearing constituted "due process of law" would be entirely to fritter away the protection to property guaranteed by the Constitution.

Under such a doctrine, a law might be sustained directing a judgment against A, B and C, for a fixed amount, without giving the defendants any opportunity to be heard, except as to the share of the fixed amount which each defendant should pay.

2d. *The sums attempted to be levied on the lands in question are so levied without reference to special benefits to the lots assessed.*

These lots are only a small portion of the district benefited. None of them front on the avenue improved. No tribunal has ever decided that the lots in question were specially benefited by the expenditure of the sum named, nor has the legislature so decided. Certainly no one can claim that the $8,293.33 charged upon them for interest, is for benefits to the lots. The original assessment, if valid, would not have drawn interest unless the law expressly so provided.

People v. Gold and Stock Tel. Co., 98 N. Y., 67, 79, 80.
Lane Co. v. Oregon, 7 Wall., 71, 80.
Hillard on Taxation, 16.
City of Camden v. Allen, 26 N. J. L., 398.
Pierce v. City of Boston, 3 Met., 520.
Shaw v. Pickett, 26 Vt., 482.
1 Desty on Taxation, 9.

No ground can be conceived which would justify the legislature in imposing on lots attempted to be assessed by an unconstitutional and void law interest upon the amount so assessed, because the interest had been charged by the Comptroller to the treasurer of the county. Interest could be charged in any case only as damages for a failure to meet a valid obligation.

O'Brien v. Young, 95 N. Y., 428.

But there was no obligation or duty to pay a void assessment. The lot owners were, therefore, guilty of no breach of duty which rendered them liable to pay interest by way of damages.

3d. *There was no apportionment of the burden of expense among the persons benefited.*

Those who refused to pay the unconstitutional assessment are selected out from among the number of those benefited, and assessed by the law of 1869. The law discriminates against those who refused to pay the void assessment. It undertakes to validate, as to them only, an assessment which was void as to all. It punishes them for asserting their constitutional rights, by imposing on them the penalty of paying the arbitrary and unconstitutional exaction which they successfully resisted, with interest and costs.

IV. The learned judge who wrote the opinion of the Court of Appeals sustained this law on the ground that the legislature adjudged, by the Act of 1881, that the lands in question were specially benefited by the local improvement. He says: "The Act of 1881 determines *absolutely and conclusively* the amount of tax to be raised and the property to be assessed, and upon which it is to be apportioned. Each of these things was within the power of the legislature whose action cannot be reviewed in the courts upon the ground that it acted unjustly and without appropriate and adequate reason." (Fol. 29.) He also says: "The legislature practically determined that the lands described in that Act were peculiarly benefited by the improvement to a certain specified amount." (Fol. 30.)

We respectfully submit that the premises assumed by the learned judge does not, in fact, exist. The legislature did *not* determine by the law of 1881 that the lands described in that Act were peculiarly benefited by the improvement in question.

The law of 1869, as amended in 1870, determined what property was to be benefited by the improvement. The lands to be thus benefited were specified in section four of that Act. (*Infra*, page 22.) But, by the amendment of 1870, the district of assessment was submitted to the judgment of the Commissioners. The Act of 1881 does not repeal these acts so far as they provide for the district of assessment, but it directs the board of supervisors to levy the amount mentioned in section one, on the lands against which assessments under the law of 1869 had been canceled, to be "equitably apportioned among the several parcels comprising said lands," *i. e.*, the lands against which assessments had been canceled. The law of 1881 determines, in effect, that a part of the lands included and specified as the benefited district under the law of 1869, as amended in 1870, shall bear a certain portion of the expenses of grading, etc., together with interest thereon. It is conceded that the lands upon which this burden is imposed consist of isolated parcels not contiguous, many of them not fronting on the avenue improved, and that a great portion of the original assessment, together with *most of the benefited territory, as fixed under the statute of* 1869, as amended, are not included within the law of 1881, nor directed to be taken into consideration in making the assessment. (Fol. 10.) The law of 1869 remains in full force, except so far as it has been adjudged unconstitutional. The repealing clause in the law of 1881 only repeals "all acts or parts of acts *inconsistent herewith*" (sec. 4, *infra*, p. 24); and no part of the law of 1869 is *inconsistent* with the law of 1881. Certainly the part of section 4, which designates the lots to be benefited as "the lands and premises fronting on said street or avenue, * * * extending back as provided heretofore in section 3 of this Act, is not inconsistent with the law of 1881, and is not repealed by it. The same may be said of the amendment of this section by chapter 619, of 1870 by which the commissioners are directed to ascertain the lands to be benefited, 'the district of assessment to extend back as provided heretofore in this Act.'"

The persons against whom these assessments were made resisted them on the ground that they were afforded no hearing as to the apportionment of the expenses of the improvement between their lands and the other lands assessed. Their resistance was successful. The Court of Appeals held that under the provisions of the law of

1869, as amended in 1870, they would be, if the assessments were upheld, deprived of their property without "due process of law," for the reason that they had no opportunity to be heard upon the apportionment as between themselves and the owners of the other lands who paid voluntarily.

The legislature of 1881 came in and said to these successful contestants in substance: "You must pay the entire amount that you were charged with by the unconstitutional law of 1869, with interest and costs. We will permit you to be heard as to how this burden shall be divided among yourselves; but we 'absolutely and conclusively' determine the proportion of the expenses of the improvement which your property shall pay. We do not adjudge that you were the only persons benefited by this improvement; on the other hand it was determined, under the law of 1869, as amended, that lands benefited by the improvement included other lands besides yours, of which your lands are a small portion; but now, although the Court of Appeals has adjudged that the law of 1869 was unconstitutional because it gave you no opportunity to be heard as to the share of these expenses which you ought to pay, we now determine, 'absolutely and conclusively,' that you must pay the proportion which you were directed to pay under the unconstitutional laws of 1869 and 1870."

The judgment of the Court of Appeals cannot be sustained without deciding that a State legislature by enacting an unconstitutional law *twice*, obviates the objection that it violates the State and Federal Constitution.

It seems to us clear that the principle stated by Judge Finch does not apply here, and that the legislature of 1881, by enacting chapter 689 of that year, simply undertook to enforce an unconstitutional law. To sustain the law of 1881 is to decide that, whenever a person resists an assessment as unconstitutional on the ground that he has had no opportunity to be heard as to what is his fair and equitable proportion of the burden to be borne by the lands constituting the benefited district, the legislature has a right to punish this assertion of his constitutional rights by substantially re-enacting the unconstitutional law and legislating that the successful contestant shall pay the sum imposed upon him, which has been declared illegal as in violation of the State and Federal Constitutions. The fact that there were several landholders, the

assessments against whose lands were canceled, and upon whose lands the assessment is undertaken to be levied by the Act in question, can make no difference. If the argument of the Court of Appeals is sound, it would apply although there had been a single contestant. Suppose that one-half of the entire expense had been imposed upon Mr. Spencer by the Act of 1869, and that he and he alone had resisted the attempted imposition. Is it possible that after the Court of Appeals had decided the law to be unconstitutional and his assessment had been canceled in pursuance of such decision, that it was within the province of the legislature to say "the Supervisors of Kings county are hereby authorized and directed to levy $50,000 upon the lands of John C. Spencer, together with interest thereon from the time it would have been paid if he had complied with the unconstitutional provisions of the Act of 1869? If not, how does it affect the principle involved, that there were several persons other than Mr. Spencer who owned lands, the assessments upon which had been adjudged unconstitutional and void and had been canceled?

V. It is unnecessary to discuss the question whether a valid law for the reassessment of these expenses could have been passed. If the law of 1881 had provided for an assessment of the entire expense of grading, etc., upon *all* the property benefited, with a provision to credit those of the owners who had voluntarily paid under the void law, and had given all parties a right to be heard as to the aggregate amount of the expenses, and as to the entire apportionment, an entirely different question would have been presented. But it is submitted that no law doing less than this, or restricting the opportunity to be heard to the apportionment of a sum arbitrarily fixed among *some parcels* of the lands benefited and originally assessed, can be sustained.

For the reasons above stated, the judgment of the Supreme Court of New York should be reversed and the court below should be directed by the mandate of this court to enter a decree declaring the assessment upon the lands in question to be void, and therefore not a lien excusing the plaintiff from their payment, and directing the defendant to complete his contract by the payment of the sum withheld.

MATTHEW HALE,
Of Counsel.

ALBERT DAY,
Att'y for Plaintiff in Error.

UNITED STATES SUPREME COURT.

JOHN C. SPENCER,

Plaintiff in error,

AGAINST

CAROLINE L. MERCHANT, EXECUTRIX, ETC., OF JOHN MERCHANT, DECEASED.

Appendix Containing so Much of the Laws of the State of New York as Relates to the Matter in Controversy.

First. *Chapter* 217 *of the Laws of* 1869, *entitled* "*An act to lay out, open and grade Atlantic avenue, in the town of New Lots, Kings county.*"

SECTION 1. The Supreme Court of the second judicial district, at a Special Term thereof, to be held in the county of Kings, shall upon the application of one or more freeholders of the town of New Lots in said county, appoint three disinterested persons, residents and freeholders of the said town, as commissioners for the purposes of this Act, and shall fill any vacancy or vacancies which may occur by reason of the death, resignation or removal from said town of any of said commissioners, or his or their inability to act, by reason of disease or other infirmity, to be adjudged by said court. The persons so appointed shall, before entering upon the duties of their appointments, severally take and subscribe the oath of office prescribed by the Constitution, and file the same in the office of the clerk of the county of Kings.

§ 2. The said commissioners shall immediately proceed to lay out in the said town, a street or avenue in continuation of Atlantic avenue, in the city of Brooklyn, and extend the said avenue in an easterly direction from Van Linderin avenue in the said town to the division line of Kings and Queens counties, the said avenue to be located within the same lines and be of the same width as it is now laid out and opened through the westerly portion of said town of New Lots. They shall cause proper stone monuments to be placed to designate the lines of said avenue so to be laid out, and shall cause a proper description of said laying out, signed and acknowledged by them, to be recorded in the office of the register of the county of Kings, and filed in the office of the clerk of the town of New Lots.

§ 3. If the owners of the land lying in the said avenue so to be laid out shall not, within three months after notice of the laying out of said avenue and recording of said description

thereof, convey the land owned by them, respectively, to the town of New Lots, for the purposes of a public street or highway, the said commissioners shall proceed to estimate the value of any lands and buildings not so conveyed and lying in said avenue, and award damages to the owners thereof, for taking the same for the purposes of a public street or highway, and at the same time assess the amount of such awards and the expenses attending such award and assessment upon the lands and premises which, in their judgment, shall be benefited by the opening and extension of said avenue, in proportion to the benefit accruing to them by reason of such opening and extension, extending to the centers of the blocks on either side of said avenue, between East New York avenue and Schenck avenue, and from Schenck avenue to the county line, extending three hundred feet from the line of said avenue. Before proceeding to make such award and assessment, they shall give public notice in two or more public newspapers published in the county of Kings, at least twenty days before meeting for that purpose, of their intention to proceed to make the award and assessment required by this Act, and of the time when and the place where they will meet for that purpose, at which meeting all persons interested may appear and be heard in relation to the said award and assessment. Such commissioners shall make such award and assessment in the form of a report, which shall be presented to the Supreme Court of the Second judicial district at a special term thereof to be held in said county, for confirmation, upon notice to be published in the newspapers aforesaid, at least fourteen days before the application for the confirmation thereof, in order that all persons having any objections to said report may be heard. Said court may confirm such report or send the same back to said commissioners for revision or correction, or may correct the same, as it may deem just. If the said report shall be sent back to the commissioners, it shall, after revision, be presented to such court again, for confirmation upon the like notice as before, and such court shall proceed thereon as before. And such proceedings shall be had towards the confirmation of said report as often as may be necessary, until such report shall be finally confirmed. Upon the confirmation of such report, the lands for which awards shall be made therein shall vest in the town of New Lots, for the purposes of a public street or highway, and the amount of the assessments on the lands assessed therein shall be returned to the supervisor of the said town, and shall, by the supervisors of the county of Kings, be added to and made a part of the annual taxes in equal proportions, for each of the ensuing three years, with interest on the portions unpaid upon the lands so assessed, and shall be paid over, when collected, to the supervisor of said town, to be paid by him to the persons entitled to receive such awards. The said commissioners shall have power to cause the necessary surveys and maps of said street or avenue to be made, and to employ a clerk

and counsel to assist them, and the expense incurred for such purposes shall not exceed five thousand dollars, and shall form part of the expense to be assessed as aforesaid.

§ 4. Upon the confirmation of the report in relation to the opening of the said street or avenue as aforesaid, or on the conveyance of the land to be taken for said avenue by the owners thereof to the town, as contemplated by this Act, the said commissioners shall be authorized to enter upon the land and premises taken for said street or avenue, and shall cause the same to be properly regulated, graded and prepared for public travel, in a manner consistent with the requirements of a public street or avenue, and to assess the expense of such regulating, grading and preparing upon the lands and premises fronting on said street or avenue, ratably according to the number of feet fronting on said street or avenue of said lands respectively, extending back as provided heretofore in section 3 of this act. They shall certify such assessment to the supervisor of the said town, and the amounts so assessed shall, together with interest at the rate of seven per cent per annum, from the time of making such assessment until the expiration of the warrant of the collector, be added by the supervisors of the county of Kings, to and made a part of the annual taxes for the ensuing year upon the lands and premises upon which they are assessed respectively, and shall, when collected, be applied to the payment of the bonds to be issued for the purposes of this Act as hereinafter provided.

Second. *Chapter* 619 *of the Laws of* 1870, *entitled*, "*An Act to amend an act entitled 'An act to lay out, open and grade Atlantic avenue in the town of New Lots, Kings County,' passed April sixteenth, eighteen hundred and sixty nine, and in addition thereto.*"

There is nothing in this act which is deemed to be material to the questions involved on this argument, and it is not, therefore, printed herein; but it is stipulated and understood that either party is at liberty to refer thereto upon the argument as if it were stated at length.

Third. *Chapter* 689 *of the Laws of* 1881, *entitled*, "*An Act to provide for the payment to the State of New York of the amount charged by the comptroller to and due from the county of Kings, by reason of the cancellation of the assessments for regulating and grading Atlantic avenue, authorized by chapter two hundred and seventeen, laws of eighteen hundred and sixty-nine, as amended by chapter six hundred and nineteen of the laws of eighteen hundred and seventy.*"

SECTION 1. The board of supervisors of the county of Kings are hereby authorized and directed to levy on the assessment-roll of the town of New Lots, in said county, in and for the year eighteen hundred and eighty one, on the lands against which assessments for regulating and grading Atlantic avenue, in pursuance of chapter two hundred and seventeen, laws of eighteen hundred and sixty-nine as amended by chapter six hundred and nineteen, laws of eighteen hundred and seventy, were canceled January twenty-ninth, eighteen hundred and seventy-nine, by the comptroller, and charged to the county of Kings, a sum equitably apportioned among the several parcels comprising said lands, which shall be sufficient to refund to the State the sum its due by reason of such cancellation, which sum, amounting to forty thousand six hundred and sixty-four dollars and ninety-six cents, was duly credited August twenty-eighth, eighteen hundred and seventy six, by the comptroller of said state to the treasurer of Kings county, and the interest charged thereon by said comptroller, as required by law, to February first, eighteen hundred and seventy-nine, amounting to eight thousand two hundred and ninety-three dollars and thirty-three cents, together with further interest thereon, at six per centum per annum from February first, eighteen hundred and seventy-nine, to the date of such levy. Before proceeding to levy such sums the said board shall apportion the same among the several parcels of land hereinbefore mentioned, and said board shall give ten days' notice of the time and place when they will meet to make such apportionment, which notice shall be published daily in a newspaper published in the county of Kings, and all parties interested in said lands shall be entitled to be heard before said board, upon the question of said apportionment.

§ 2. The sums so levied, in accordance with the provisions of the foregoing section, shall be collected by the duly authorized collector of taxes of said town, in the same manner as the other taxes levied on said assessment-roll of said town are collected; but shall be kept separate and distinct therefrom, and, when collected, shall be separately paid to the treasurer of Kings county. When the said collector shall make his return of unpaid taxes, levied on the assessment-roll of his town, in and for the year eighteen hundred and eighty-one, to said treasurer, he shall embrace in a separate report a list of such of the lands on which said special tax was imposed and remains unpaid, together with the sums so levied against each of said parcels, for that purpose, with such interest and fees thereon, if any, as are required by law to be added by the collector to other taxes returned by him to the county treasurer as unpaid. In case the said special taxes or assessments so returned to the said treasurer, or any of them, shall remain unpaid at the expiration of thirty days after the delivery thereof to him by the said collector, the said treasurer shall give not less than thirty days' notice, by affixing

a written or printed copy of said notice in four public places in said town of New Lots, that at the time and place specified in said notice, he will sell, at public auction, the lands on which such special taxes or assessments remain unpaid, for the lowest term of years for which any person will take the same and pay the amount of such assessment, with interest thereon at the rate of ten per centum per annum from the time the same was returned by the said collector. Such sale of any parcel of land for such unpaid special tax or assessment thereon shall be subject to all other taxes or assessments that may then be due or payable thereon. If no person shall bid for any parcel of land then offered for sale the said treasurer shall bid it in for a term of not less than one hundred years, in the name and for the benefit of the town of New Lots. He shall also give a certificate of such purchase to the purchaser of each parcel at said sale, who shall become entitled to a lease or conveyance thereof from the treasurer of said county, unless the said parcel shall be redeemed within two years from the time of said sale by the payment to the purchaser, or to said treasurer for such purchaser, of the sum paid therefor, with interest thereon at the rate of ten per centum per annum.

§ 3. All amounts received by said treasurer from the collector of said town, in payment of said special tax or assessment, or that said treasurer may receive in payment for lands sold at any such sale, shall be applied by him to pay the amount so due the state of New York by reason of such cancellation.

§ 4. All acts or parts of acts inconsistent herewith are hereby repealed.

§ 5. This act shall take effect immediately.

Fourth. *Chapter* 189 *of the Laws of* 1882, *entitled* "*An act to provide for the division into three annual installments the assessments for grading Atlantic avenue in the town of New Lots, in the county of Kings, first assessed under the provisions of chapter two hundred and seventeen, Laws of eighteen hundred and sixty-nine, as amended by chapter six hundred and nineteen, Laws of eighteen hundred and seventy, and apportioned by the board of supervisors of said county under the provisions of chapter six hundred and eighty-nine, laws of eighteen hundred and eighty-one.*"

SECTION 1. The treasurer of Kings county is hereby authorized to receive payment of any assessment returned to him under the provisions of chapter six hundred and eighty-nine, laws of eighteen hundred and eighty-one, made prior to the annual meeting of the board of supervisors of said county for the year eighteen hundred and eighty-two. At such meeting he shall hand an

account of said assessment remaining unpaid to the said board, and the said board shall cause one-third part of said assessment to be included in and made a part of the annual taxes upon lands liable for said assessments, but in a column separate and apart from the other taxes, for each of the ensuing three years, and when so levied shall be chargeable with the same interest, default and fees as the other taxes of said town.

§ 2. The collector shall each year make a separate return of the installments remaining unpaid for the year, first adding thereunto default and fees to the treasurer of said county, who shall credit him with the amount thereof. The said treasurer is hereby directed to receive payment of any installment so returned, made prior to the first day of May, eighteen hundred and eighty-five.

§ 3. The treasurer of said county is hereby authorized to receive payment of any installment not then levied as aforesaid, with collector's fees for said collector, and to discharge so much of said assessment.

§ 4. Should any of said installments remain unpaid on the first day of May, eighteen hundred and eighty-five, the said treasurer is hereby directed to apportion among the several parcels of land the expenses of advertising and selling the same as provided for in this section, and the aggregate amount of installment or installments and expenses as aforesaid, shall be the amount for which each of said parcels is to be sold. The said treasurer shall then give thirty days' notice by publishing the same in each of the local papers published in said town, and in three of the leading daily papers published in said county, once each week for four consecutive weeks, that at a time and place to be specified in said notice he will sell at public auction the lands upon which said installments, or any of them remain unpaid as aforesaid, for the lowest term of years for which any person will take the same and pay the amount due upon any of said parcels. Such sale shall be subject to all other taxes and assessments that may be due or payable thereon. If no person shall bid for any parcel of land then offered for sale, the said treasurer shall bid it in for a term of not less than one hundred years in the name of and for the benefit of the town of New Lots. He shall also give a certificate of such purchase to the purchaser of each parcel at said sale, who shall become entitled to a lease or conveyance thereof from the treasurer of said county, unless the said parcel shall be redeemed within two years from the time of said sale by the payment to the purchaser or to the said treasurer for such purchaser of the sum paid therefor, with interest thereon at the rate of ten per cent per annum.

§ 5. All amounts received from the collector by said treasurer, or received by him in payments of said assessments, or any installment or installments, or that he may receive in payment of lands sold at any such sale, shall be applied by him to pay the amount due the state of New York by reason of the cancellation of said assessments.

§ 6. All acts and parts of acts inconsistent with the provisions of this act are hereby repealed.

§ 7. This act shall take effect immediately.

Fifth. *Chapter* 339 *of the Laws of* 1885, *entitled "An act to amend chapter one hundred and eighty-nine of the Laws of eighteen hundred and eighty-two, entitled 'An act to provide for the division into three annual installments, the assessments for grading Atlantic avenue, in the town of New Lots in the county of Kings, first assessed under the provisions of chapter two hundred and seventeen, Laws of eighteen hundred and sixty-nine, as amended by chapter six hundred and nineteen, Laws of eighteen hundred and seventy, and apportioned by the board of supervisors of said county under the provisions of chapter six hundred and eighty-nine, Laws of eighteen hundred and eighty-one.'"*

Section 1. Section two of chapter one hundred and eighty-nine of the laws of eighteen hundred and eighty two is hereby amended so as to read as follows:

§ 2. The collector shall each year make a separate return of the installments remaining unpaid for the year, first adding thereunto default and fees to the treasurer of said county, who shall credit him with the amount thereof. The said treasurer is hereby directed to receive payment of any installment so returned, made prior to the first day of May, eighteen hundred and eighty-seven.

§ 2. Section four of said chapter is hereby amended so as to read as follows:

§ 4. Should any of said installments remain unpaid on the first day of May, eighteen hundred and eighty-seven, the said treasurer is hereby directed to apportion among the several parcels of land the expenses of advertising and selling the same, as provided for in this section, and the aggregate amount of installment or installments and expenses as aforesaid shall be the amount for which each of said parcels is to be sold. The said treasurer shall then give thirty days' notice by publishing the same in each of the local papers published in said town, and in three of the leading daily papers published in said county, once each week for four consecutive weeks, that at a time and place to be specified in said notice he will sell at public auction, the lands upon which said installments, or any of them, remain unpaid as aforesaid, for the lowest term of years for which any person will take the same and pay the amount due upon any of said parcels. Such sale shall be subject to all other taxes and assessments that may be due or payable thereon. If no person shall bid for any parcel of land then offered for sale, the said treasurer shall bid it in for a term of not less than one hundred years, in the name of and for the benefit of the town

of New Lots. He shall also give a certificate of such purchase to the purchaser of each parcel at said sale, who shall become entitled to a lease or conveyance thereof from the treasurer of said county, unless the said parcel shall be redeemed within two years from the time of said sale by the payment to the purchaser or to the said treasurer, for such purchaser, of the sum paid therefor, with interest thereon, at the rate of ten per cent per annum.

§ 3. Nothing in this act contained shall be construed to impair the validity of said assessments, but the same are hereby affirmed and confirmed, and the unpaid installments are hereby made a lien upon the several parcels of land respectively liable for said assessments.

§ 4. This act shall take effect immediately.

It is hereby stipulated and agreed between the parties hereto that the foregoing copy of statutes of the State of New York bearing upon or involved in the determination of this case, may be used and referred to on the argument of this cause, and considered in evidence herein; and that either counsel may refer to any other statutes, and to any reports of judicial decisions bearing upon the questions involved herein, with the same effect as if the same had been formally put in evidence.

Dated *January* 3, 1887.

ETHAN ALLEN,
Att'y for Defendant for purposes of this paper.

ALBERT DAY,
Att'y for Plaintiff in error.

SUPREME COURT OF THE UNITED STATES.

1 OCTOBER TERM.

John C. Spencer, plaintiff in error, *against* Caroline L. Merchant, executrix of John Merchant, deceased, defendant in error.	No. 1304.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT.

This case comes before this court upon a writ of error sued out by the plaintiff to review the judgments of the Court of Appeals of the
2 State of New York and of the Supreme Court of the State of New York. There are three assignments of error.

1st. That chapter 689 of the laws of New York for the year 1881, and the proceedings thereunder, were in violation of the Constitution of the United States, and void, for the reason that they deprived the plaintiff, and other persons assessed thereunder, of their property without due process of law.

2d. That the assessment made under said statute was illegal and void, because the same was in pursuance of the said act of the Legislature of the State of New York, which was unconstitutional and void.

3 3rd. That the judgments given in favor of the defendant against the plaintiff were null and void.

See assignments of error, p. 15, fols. 30 to 41.

This case came before the Supreme Court, General Term, for the Second Judicial Department, upon a case made in which all the facts in dispute were agreed upon under section 1279 of the Code of Civil Procedure. The plaintiff seeks to compel the defendant to perform a contract for the purchase of real property in the town of New Lots, Kings county, New York. The defendant refused to complete the contract unless the plaintiff removed therefrom a lien of $1,221.73, with interest thereon, being an assessment of record against the real property in question. This the plaintiff declined to do, and hence this action.

4 In 1869 the Legislature of the State of New York passed an act providing for doing certain work upon Atlantic avenue in the town of New Lots, Kings county, which was to be paid for by assessment upon the property owners benefited by the improvement.

Laws of the State of New York, 1869, chap. 217, amended by Laws of 1870, chap. 619.

Pursuant to these statutes the work upon the line of the improvement was done and completed, and assessments therefor were duly laid
5 upon the property supposed to be benefited thereby. Some of these assessments were paid voluntarily; others were contested. In 1878, the Court of Appeals of the State of New York, in the case of *Stuart* v. *Palmer*, decided that the statutes above referred to, under which the assessments had been laid, were unconstitutional and void, for the reason that they imposed an assessment "for a local improvement, without notice to, and hearing, or an opportunity to be heard, on the part of the property-owner, which had the effect to deprive him of his property without due process of law."

Stuart v. Palmer, 74 N. Y. 183.

6 Thereafter, in the year 1881, the Legislature of the State of New York passed a statute, by the terms of which it was provided that these same assessments, which had not been paid and which had been made under the statutes so declared unconstitutional as above, should be placed by the supervisors of the county of Kings, with interest added, and apportioned upon the specific pieces of property within the assessed district which had not paid the assessment for this improvement. The only notice which the supervisors were required to give to the property-owners in interest was a notice as to the apportionment of the assessment upon the different parcels. No provision was made for the questioning of the amount of the assessment. In other words, the property-owners found their property assessed for the same amounts under the statute of 1881 as they did under the statutes of 1869 and 1870, with this exception, that it was increased by interest being added.

Laws of the State of New York of 1881, chap. 689.

7 The judgments of the General Term of the Supreme Court and of the Court of Appeals were in favor of the defendant in errror.

POINT I.

The statute complained of, to-wit, chapter 689 of the Laws of 1881, is constitutional and valid.

It is claimed that this statute is in violation of article 14, section 1 of the Constitution of the United States. This article provides, among other things, in words as follows: "Nor shall any State deprive any person of life, liberty or property, without due process of law."

8 It must be conceded that due process of law is a restraint upon the legislative as well as the executive and judicial powers of the Government.

Murray, Lessee, v. Hoboken Land Improvement Co., 18 How. (U. S.) 272.

It seems to be generally settled that the levying of an assessment without any notice to the property-owners is the taking of property, under the Constitution, without due process of law. "In such proceedings, therefore, it must be a matter of the utmost importance to the person assessed that he should have some opportunity
9 to be heard before the charge is fully established against him."

Cooley on Taxation, 265.
Overing v. Foote, 65 N. Y. 263.
Philadelphia v. Miller, 49 Penn. 440.
Davidson v. Board of Administrators, New Orleans, 17 Albany Law Journal, 223.

These cases seem to hold that before an assessment can be laid and property taken by due process of law, that some notice must be given. It is, however, the province of the Legislature to prescribe the kind of notice and the mode in which it may be given. It cannot dispense with all notice.

Stuart v. Palmer, 74 N. Y. 184.

10 The present act of the Legislature does provide that notice shall be given. "Before proceeding to levy such sums the said board shall apportion the same among the several parcels of land hereinbefore mentioned, and said board shall give ten days' notice of the time and place when they will meet to make such apportionment, which notice shall be published daily in a newspaper published in the county of Kings, and all parties interested in said land shall be entitled to be heard before said board upon the question of said apportionment."

Chap. 689, Laws of 1881.

As to this notice being given there is no dispute, and this notice it is claimed gives the property-owner every right to which he is entitled.

The Legislature of the State of New York had power, upon providing for the giving of notice as above set out, to place any tax upon property for public purposes that it saw fit. Its power of taxation to that extent is unlimited.

Weisner v. Village of Douglas, 64 N. Y. 91.
In the Matter of Van Antwerp, 56 N. Y. 261.

It may be that exaction in such matters may be oppressive and
11 unjust, still it is unlimited.

Litchfield v. Vernon, 41 N. Y. 123.
People v. Brooklyn, 4 N. Y. 427.
Horn v. Town of New Lots, 83 N. Y. 100.